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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES C. PAYNE, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. In Spies v. United States, 317 U.S. 492 (1943), this Court held that willful failure to file an income tax return or pay a tax constitutes a misdemeanor, and to elevate that crime into the felony of attempted tax evasion, there must be some additional affirmative act constituting an attempt. The question presented is whether the affirmative act must be committed during the six-year statute of limitations period applicable to tax evasion.

2. In Cheek v. United States, 498 U.S. 192 (1991), this Court ruled that forbidding a jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision. The

courts below refused to allow the petitioner to introduce crucial evidence showing the basis for his belief (i.e., to negate willfulness), even when that evidence was actually studied and relied upon by the petitioner The question presented is whether the court of appeals has erroneously restricted the Cheek evidentiary directive.

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Petitioner, James C. Payne, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on October 28, 1992. The petition for rehearing was denied on November 24, 1992.

OPINION BELOW

The opinion of the court of appeals is reported at 978 F.2d 1177 (App., infra at Appendix A). There was no opinion of the district court.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1992 (App., infra, Appendix A). The court of appeals denied a petition for rehearing on November 24, 1992 (App., infra, Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 6531(2) of the Internal Revenue Code of 1954 (26 U.S.C.) as amended:

SECTION 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years --
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;...

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.) as amended:

SECTION 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or

> defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) as amended:

SECTION 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to

> make a return...[1], keep records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation) or imprisoned not more than 1 year, or both, together with the costs of prosecution.

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[1] A parenthetical phrase, not relevant to this case, was deleted from section 7203, effective for tax years beginning after December 31, 1984. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 412(b)(9), 98 Stat. 494 at 792.

STATEMENT OF THE CASE

1. James C. Payne was indicted on March 22, 1991 in the District of Wyoming. Counts 1-4 charged Payne with tax evasion under 26 U.S.C. 7201 for the years 1984, 1985, 1986 and 1987. Counts 5-7 charged Payne with false representations of social security numbers under 42 U.S.C. 408(a)(7)(B). A copy of the indictment is attached (App., infra at Appendix C).

Count 1 alleged that Payne attempted to evade his income tax for the year 1984 by: (1) failing to file an income tax return; (2) failing to pay his income tax; (3) concealing and attempting to conceal his income from the Internal Revenue Service ("IRS"), and; (4) using false social security numbers. Counts 2,

3 and 4 alleged identical conduct for the years 1985, 1986 and 1987.

It was not contested that Payne had failed to file income tax returns and had not paid income tax for the relevant years.[2]

The government's theory and evidence of concealment were that Payne used false social security numbers to conceal his income (interest and dividends) from the Internal Revenue Service. Between 1977 and 1984, Payne had provided false social security numbers to his bank and three brokerage firms (collectively "the Payors") when he opened accounts with those institutions. He provided his correct name and address, and lived at the

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[2] After his arrest, Payne filed the returns and paid the taxes for the years in question.

same address from 1978 through the date of his arrest and trial. Payne made no attempt to conceal his income except for the single instance of providing false social security numbers when he opened his accounts. His entire life savings stayed on deposit with the same Payors at all times. There were no cash transactions nor other income sources. Dr. Payne was a retired psychiatrist whose only source of income was the interest and dividends received from the Payors.

The Payors issued Forms 1099[3]

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[3] Form 1099 is an "information return" prepared by a payor of interest or dividends. The payor files Form 1099 with IRS reporting the amount of interest or dividends which it paid to the recipient each year. 26 U.S.C. 6042 and 6049. IRS then compares the data furnished by the payor with the income tax returns of the recipients to ensure that all interest and dividend income has been reported. The recipient does not prepare or file a Form

annually for the 1984-1987 tax years, reporting Payne's interest/dividend income to the Internal Revenue Service under the incorrect social security numbers. The Payors also sent a copy of each Form 1099 to Payne.

At the conclusion of the government's case, Payne moved for a judgment of acquittal on the grounds the evidence was insufficient to sustain a conviction for tax evasion because a timely "affirmative act" had not been proven. Payne argued that his failure to correct the false social security numbers was not an affirmative act within the meaning of Spies, which requires the commission of an affirmative, positive act as contrasted with an omission. The government

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1099.

countered that Payne's failure to correct the social security numbers during the indictment years constituted a continuing crime and a reaffirmation of the false numbers. The district court denied the motion, ruling that it was a jury question whether failure to correct was a continuing act of concealment.

Dr. Payne took the stand in his own defense. He testified that he did not willfully commit tax evasion because he had a good faith belief he was not violating the law based upon his honest misunderstanding of the Internal Revenue Code's tax return filing requirements.

The heart of this defense was that Payne had been mislead by material he had read and legal research he had performed. Never did the defense even intimate that

Payne's prior view of the law was correct. The defense was that he had an erroneous but good faith misunderstanding of his legal duty. The defense intended to corroborate Dr. Payne's testimony by showing the jury just how seductive the materials had been.

The district court prohibited the defense from introducing the exhibits even though they had been actually written or relied upon by Dr. Payne. Those exhibits are the following:

Exhibit	Description
L	Defendant's handwritten notesre: tax law research
H	Defendant's highlighted copy of Flora v. United States
I	Defendant's marked-up copy of How Anyone Can STOP PAYING Income Taxes by Irwin Schiff
M	Defendant's marked-up copy of the 1984 Internal Revenue Code

N Defendant's marked-up copy of the 1987 Internal Revenue Code

Dr. Payne was a successful psychiatrist in Wisconsin until 1977 when he moved to a remote part of Wyoming with his wife and two young sons. While in Wisconsin Payne had always filed and paid his taxes, using an accountant. Shortly after moving to Wyoming, he filed his 1977 tax return and paid his taxes.

Dr. Payne did not practice medicine after moving to Wyoming. He had developed severe pain from cervical disc disease. He tried to simplify his life and finances, hoping that the move "would draw [his] family closer together." His sole source of income was interest and dividends earned on his life savings. Payne's dream of a simple family life in the wilderness failed. His house was

twenty miles from the nearest small town (Dubois) and eight miles from the public road. The winters were long and brutal: "My family was disintegrating, the fact that we had gotten on this isolated ranch, and instead of pulling us together it was pulling us apart." In March 1978 Payne was devastated by his father's suicide in Wisconsin. His mother died a few months later. He was "filled with guilt that we should have never left the Midwest and taken his grandchildren away from him." Aggravating the isolation was the fact that Payne was a loner with no close neighbors and only one close friend in town. His wife finally couldn't put up with their "lifestyle" any longer, and took the two boys to Texas. After moving to Wyoming, Payne listened to talk-radio

shows discussing our tax system. He received literature from a tax protester organization. Unsure of what it meant, he decided to research the tax law. Dr. Payne copied this Court's opinion in Flora v. United States, 362 U.S. 145 (1960), underlining a sentence which reads: "Our system of taxation is based upon voluntary assessment and payment, not upon distraint." Id. at 176. He then looked up the definition of "distraint" and found it defined as "coercion or force." Payne's research seemed to confirm that the act of filing a tax return was voluntary, but that if he did not file a return, the government would assess him.

He would have paid the tax if the government had sent him a bill.[4]

Payne purchased a book entitled How Anyone Can STOP PAYING Income Taxes by Irwin Schiff, which supported his initial research that the filing of a tax return is voluntary and that the Internal Revenue Service must assess taxes and send the taxpayer a bill. Schiff cited sections of the Internal Revenue Code which Payne subsequently purchased. Payne verified that Schiff's Internal Revenue Code citations were correct, thereby confirming his belief that the filing of a return was voluntary and that the Internal Revenue

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[4] Payne took the same approach to his local property taxes. He refused to voluntarily provide answers to the assessor's questions regarding ownership of equipment, livestock and saddles, but he always paid his property taxes when the local government sent him the bill.

Service would eventually bill him. During his legal research, Payne prepared detailed handwritten notes analyzing case law and Code sections. He testified that, "I guess I slipped into the position of believing what they [Schiff, et. al) had to say."

The trial court rejected all of the exhibits, ruling that "there is a danger of prejudice here ... that outweighs any evidentiary purpose that could be served with regard to the issue of willfulness." The court's concern that the exhibits might mislead the jury underscores their potential for misleading Dr. Payne, who had prepared or studied them without guiding instructions from a federal judge.

The defense argued that simply allowing Payne to read limited portions of

the documents to the jury was not sufficient because,

> not only are the words, which the jury has heard some of, but the very presentation has an effect to make them more or less persuasive... [W]e live in an information society, that point has been made to us ad nauseam, people spend a great deal of money presenting great glossy kinds of presentations when they could perfectly write it on a memorandum graph sheet.
>
> And I think they do that because they think the presentation makes a difference.
>
> The other problem is that the government's evidence will go in with the jury, because it is exhibits, and the jury will be left with only memory of that we have said here. And given the

> fact that ... specific intent is the central issue in this case, I think that wide latitude should include letting these come in.

The defense then moved for a mistrial, which was denied.

When Dr. Payne again took the stand, he continued to testify as to the results of his research, and the significant impact of the actual Internal Revenue Code volumes[5] (he "was overwhelmed when he obtained them") and Schiff's book. The book's glowing biography of Schiff with his impressive credentials and published writings caused Payne to be "impressed

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[5] The Special Agent testified that Payne's purchase of tax codes probably showed that Payne must have had knowledge of his legal duties. The jury was never given a chance to fully evaluate Dr. Payne's testimony that the tax codes had, to the contrary, misled him.

that this man apparently knew what he was talking about", especially after Payne believed his independent research confirmed Schiff's conclusions. On cross-examination, Payne reiterated that he did not see a need to consult with any tax advisors because the books and cases he relied upon seemed clear, convincing and authoritative.

The jury returned a verdict of guilty on all counts.

2. The court of appeals affirmed the convictions for tax evasion.[6] That

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[6] The appellate court reversed the convictions for false representations of social security numbers. It ruled that the statute of limitations barred conviction because Payne had provided the false numbers to the Payors between 1977 and 1984 (beyond the five-year statute), and that failure to correct those numbers was not a continuing offense nor an annual reaffirmation by Payne.

opinion did "not decide whether [Payne's] failure to correct the erroneous social security numbers satisfies the 'affirmative act' element of §7201 because [Payne's] argument is premised on the erroneous assumption that an affirmative act commences the running of the statute of limitations. Generally, the statute of limitations does not begin to run until the crime is complete." The appellate court ruled the statute began to run when Payne failed to file his 1984 tax return on April 15, 1985, so that the March 22, 1991 indictment was timely.

The court of appeals found no abuse of discretion in the trial court's evidentiary ruling prohibiting Payne from introducing his handwritten notes and legal research materials into evidence.

The opinion relied upon a prior circuit decision that "Cheek [does] not require the admission of any and all evidence showing a basis for the defendant's belief."

REASONS FOR GRANTING THE PETITION

1. THE COURT OF APPEALS NULLIFIED THE STATUTE OF LIMITATIONS FOR TAX EVASION.

The appellate court ruled that the affirmative act element of tax evasion can be committed more than six years prior to indictment. Such an interpretation of Spies nullifies the six-year statute of limitations applicable to tax evasion, 26 U.S.C. 6531(2). In all other decided cases, courts have held that an affirmative act of evasion must occur within the six-year period prior to indictment.

This is the first time a court of appeals has ruled that the affirmative act may lie beyond six years prior to the indictment. We respectfully submit this is "an

important question of federal law which has not been, but should be, settled by this Court." Rule 10.1(c), Rules of the Supreme Court of the United States.

The unreasonable effect of the decision can be seen using the facts of the case at bar. Payne may have committed "affirmative acts" of tax evasion between 1977 and 1984 when he opened his bank and brokerage accounts. After that time, he committed no acts of any kind - he just did nothing (e.g., did not file tax returns; did not provide false information to the Internal Revenue Service; did not close any existing accounts; did not open any new accounts; did not correct the erroneous social security numbers on his old accounts; did not conceal income or assets.) The rationale of the court of

appeals means if Payne were to fail to file a tax return for the rest of his life, he could be prosecuted each year until he died for felony tax evasion because of his 1977-1984 conduct. This cannot be the result intended by Congress when it enacted 26 U.S.C. 6531(2). Should the government be able to use an affirmative act committed twenty or thirty years earlier to support a conviction for tax evasion? Such a defendant would not escape punishment, however, for chronic non-compliance with the tax laws. He could be prosecuted each year for willful failure to file under 26 U.S.C. 7203.

The court of appeals correctly stated the general rule that "a statute of limitations does not begin to run until the crime is complete". Numerous courts

have applied the rule when the affirmative act occurs after the tax return is due. If the defendant files a fraudulent return - an affirmative act - he completes the offense, and the prosecution must commence within six years. If the defendant commits another affirmative act which relates to that return after his return is filed, circuit courts have properly held that the prosecution may commence within six years of the last affirmative act. Those decisions, as set forth in footnote 2 of the court of appeals opinion, expressly hold that an affirmative act must occur within six years of indictment. The same rationale applies if no return is filed and an affirmative act occurs after the due date of the return. For example,

the first circuit reiterated the prevailing rule:

> An act constituting evasion which occurs during the limitation period brings the prosecution within the statute of limitations even if the taxes being evaded were due and payable prior thereto (emphasis supplied).

United States v. Ferris, 807 F.2d 269,271 (1st Cir. 1986), cert. denied 480 U.S. 950 (1987).

These cases hold that each affirmative act starts or restarts a statute of limitations period. None holds that an omission can do so. Even conspiracy law requires an overt act within the statute of limitations period.

The general rule as interpreted by the court of appeals leads to error, however, when no tax return is filed and

the affirmative act occurs before the tax return was due to be filed.[7] The tenth circuit's application of the general rule to this case means that the affirmative act can occur at any time before indictment. Here, the acts occurred seven to fourteen years before Payne's indictment. There is no time limit under the court of appeals rationale. Thus, it improperly nullifies the six-year statute of limitations.

This Court has ruled that:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the

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[7] If the tenth circuit had properly applied the general rule, it would have had to decide whether Payne's failure to correct the erroneous social security numbers was an affirmative act.

> occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges where the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[8]

Toussie v. United States, 397 U.S. 112, 114-115 (1970).

The court of appeals decision conflicts with this explanation of the

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[8] In this case, earlier investigation of the incorrect social security numbers would have brought the matter to light well within the limitation period.

purpose of a statute of limitation. Congress has made tax evasion a felony, and has limited its prosecution to six years "after the commission of the offense." The court of appeals decision means there is no six-year limitation when an affirmative act occurs before the return is due.

The court of appeals did not explicitly address whether it interpreted tax evasion to be a continuing offense. Its rationale, however, makes any affirmative act a continuing act, continuing without limit. [9] If a 1977 act

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[9] The court's reliance on seven to fourteen year old conduct (providing incorrect social security numbers) as being a timely affirmative act conflicts with the court's rejection of the same conduct as a social security crime. It reversed the social security conviction on the basis that the false numbers had been furnished beyond the statute of

can elevate a 1985 failure to file to a felony, why not 1990 or 1997? The Toussie opinion provided a thorough explanation of the continuing offense doctrine and its tension with the purpose of the statutes of limitation. This Court held that a particular offense should not be construed as a continuing one "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that

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limitations, holding that false representation of a social security number is not a continuing crime. The court of appeals thus has said that the act was a continuing one for tax law purposes but not for social security law purposes. This scholastic distinction is overly delicate for fair application of the criminal law. Although the affirmative act necessary for tax evasion need not be an independent crime, the affirmative act in this was an independent crime. How can the conduct have continuing effect for one statute and not the other?

Congress must assuredly intended that it be treated as a continuing one." Id. at 115. The government, the defense and the trial court all assumed that the affirmative act had to occur within six years of indictment. Payne argued that his failure to correct the false social security numbers was not an affirmative act, while the government countered that Payne's failure to correct was an "annual reaffirmation" which constituted an affirmative act. See, footnote 6, supra.

The court of appeals decision conflicts with the fifth circuit opinion in United States v. Williams, 928 F.2d 145 (5th Cir. 1991), cert. denied __ U.S.___, 112 S.Ct. 58 (1991). The facts of Williams are similar to ours, except that Williams submitted false Forms W-4 to his

employer beyond the six-year limitations period. The fifth circuit implicitly recognized that the affirmative act element must be committed within six years of indictment. Noting the Form W-4 instructions to employees requiring amendment if withholding circumstances changed, the fifth circuit found that Williams was under a continuing obligation to correct his intentional misrepresentation. The court ruled that Williams committed a timely "affirmative act" by failing to amend the form. Unlike the tenth circuit, the fifth circuit recognized that the affirmative act must be committed within six years of indictment.

In conclusion, this Court has never determined whether the affirmative act

element of an attempt to evade taxes must be committed within the six-year period of the statute of limitations. The court of appeals' ruling has the effect of nullifying the statute of limitations. We respectfully submit this is an important question of federal law which has not been, but should be, decided by this Court.

2. THE TENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF CHEEK IS IN CONFLICT WITH THE SEVENTH, NINTH AND ELEVENTH CIRCUITS

This Court has ruled that:

> forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.

Cheek v. United States, 498 U.S. 192, ___, 1991 U.S. Lexis 348 at page 10 (1991).

The issue before this Court raises this "serious question."

Although the issue in Cheek was not an evidentiary ruling, this Court emphasized that evidence presented by a defendant regarding his beliefs is crucial to a fair trial. The "serious question" mentioned by the Court is more than dicta. To put serious meaning into the subjective standard of willfulness, trial courts must give a defendant every chance to prove the honesty of his good-faith, although unreasonable, belief.

The seventh, ninth and eleventh circuits have interpreted the Cheek evidentiary directive to allow a defendant to introduce any relevant evidence upon which he claims to have actually relied

for the purpose of disproving the willfulness element of specific intent tax crimes. The tenth circuit has rejected those interpretations, and refuses to allow defendants to introduce evidence that might negate willfulness. The decisions of the tenth circuit are in direct conflict with those of the seventh, ninth and eleventh circuits. Rule 10.1(a), Rules of the Supreme Court of the United States. We respectfully submit this is a "special and important reason" for the petition for a writ of certiorari to be granted.

The tenth circuit court of appeals followed its "post-Cheek precedent" and ruled that the district court did not abuse its discretion by refusing to accept Payne's proffered exhibits into evidence.

The court held that, "Cheek does not require the admission of any and all evidence showing a basis for the defendant's belief." Since the trial court allowed Payne to read limited portions of his exhibits to the jury while testifying, the tenth circuit concluded that his "direct testimony was far more probative on the issue of his good faith misunderstandings of the tax laws than the actual materials."

Ninth Circuit

In United States v. Powell, 955 F.2d 1206 (9th Cir. 1992), the ninth circuit reversed convictions under 26 U.S.C. 7203 of husband and wife tax protesters because the good-faith defense instruction was based upon an objective standard. The district court did not allow the Powells

to present the statutes or cases they had relied upon in forming their belief. Id. at 1209.

The ninth circuit addressed the evidence issue "in order to provide guidance to the district court on remand and in similar cases." After quoting the Cheek language regarding "a serious question under the Sixth Amendment," it directed that:

> [A district court] ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was in §7203 cases because willfulness is an element of the offense. In §7203 prosecutions, statutes or case law upon which the defendant claims to have actually relied are admissible to disprove that element if the

> defendant lays a proper foundation which demonstrates such reliance... . In addition, the court may instruct the jury that the legal material admitted at trial is relevant only to the defendant's state of mind and not to the requirements of the law, and may give other proper cautionary and limiting instructions as well. [emphasis in original]

Id. at 1214.

Seventh Circuit

The seventh circuit adopted Cheek's evidentiary rule in United States v. Harris, 942 F.2d 1125 (7th Cir. 1991). Ms. Harris was convicted of tax evasion and failure to file (26 U.S.C. 7201 and 7203) for failing to report over half a million dollars. She claimed that she had

believed the money was a gift from her elderly paramour; the government claimed it was income derived from prostitution. The seventh circuit reversed her conviction because the district court refused to admit into evidence "love letters" from her elderly benefactor. The district court had excluded the letters both as hearsay and because possible prejudice outweighed their probative value (Fed. R. Evid. 403).

The seventh circuit rejected the hearsay analysis:

> [T]he letters were not hearsay for the purpose of showing what Harris believed, because her belief does not depend on the actual truth of the matters asserted in the letters. Even if Kritzik were lying, the letters could have caused Harris to

> believe in good faith that the things he gave her were intended as gifts. [citations omitted]. This good faith belief, in turn, would preclude any finding of willfulness on her part.

Id. at 1130.

The circuit then rejected the Rule 403 analysis. After noting that problems like this - evidence admitted for one purpose but not another - are generally within a district court's discretion, the circuit court stated:

> In this case however, the letters were too important to Harris' defense to be excluded. Her belief about Kritzik's intent decides the issue of willfulness, ... and she had no other objective means of proving that belief. True, admitting the letters would probably lead to some prejudice

> to the government's case. The jury would be hard pressed to consider the letters only for the permissible issue of what Harris thought of Kritzik's intent, and not for the impermissible issue of what Kritzik actually intended. The alternative, however, is to strip Harris of evidence that we believe was essential to a fair trial [emphasis supplied].

Id. at 1131.

Eleventh Circuit

The eleventh circuit expressly adopted Cheek's evidence rule in United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992). Lankford was convicted under 26 U.S.C. 7206(1) for failing to report $1500 he received as a taxable campaign contribution; he contended the money was a

gift. The trial court refused to allow expert witness testimony that Lankford's belief that the money was a non-taxable gift was reasonable, which tends to make a belief seem more likely to be held in good-faith. The circuit court reversed the trial court:

> Any evidence concerning the reasonableness of Lankford's belief that the $1500 he received was a gift rather than taxable income is relevant to the determination of whether Lankford willfully violated the tax laws. The Supreme Court has recognized that "the more unreasonable the asserted beliefs or misunderstandings [of a defendant] are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the

> tax laws and will find that the Government has carried its burden of proving knowledge. Cheek, 111 S.Ct. at 611-12. It is thus highly probative for the defense to show that the defendant's belief -whether or not mistaken - was reasonable; evidence of a belief's reasonableness tends to negate a finding of willfulness and to support a finding that the defendant's belief was held in good faith.
>
> Id. at 1550.

and concluded that:

> The trial court deprived Lankford of evidence showing that his asserted state of mind was reasonable. Accordingly, we hold that the exclusion of expert testimony on this issue was error.
>
> Id. at 1551.[10]

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[10] In Lankford, the court's error was further compounded because the government was permitted to elicit an expert opinion

Tenth Circuit

The tenth circuit has said since 1969 that in tax offenses "...the accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." United States v. Brown, Jr., 411 F.2d 1134, 1137 (10th Cir. 1969). In cases involving tax protesters, however, the tenth circuit has constricted Brown. In at least five decisions, the tenth circuit has upheld district courts' rulings excluding tax protest literature, books, case law and statutes which

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that Lankford's belief was not reasonable. This parallels our case in that the government used Payne's copy of the Internal Revenue Code to buttress its argument that he understood his duty, but the defense was not allowed to let the jury see how confusing the actual Internal Revenue Code language could be.

defendants tried to introduce as the basis for their claimed good-faith belief. So long as the district courts allowed the defendants to testify about their research into tax law, the circuit has found no abuse of discretion or plain error in the exclusion of the actual research materials, and that any error was harmless. United States v. Willie, 941 F.2d 1384 (10th Cir. 1991); United States v. Fingado, 934 F.2d 1163 (10th Cir. 1991); United States v. Mann III, 884 F.2d 532 (10th Cir. 1989); United States v. Hairston, 819 F.2d 971 (10th Cir. 1987); United States v. Harrold, Sr., 796 F.2d 1275 (10th Cir. 1986).

The basis for these decisions is concern that the legal and quasi-legal material will confuse the jury as to what

the law actually is. This rationale demonstrates its own error. If the excluded documents are likely to confuse the jury, then they are also likely to have confused the defendant. The effect of the excluded documents on Dr. Payne was crucial to the issue of willfulness. The jury might have seen that the material is indeed misleading and believed Dr. Payne. On the other hand, the jury might have decided that the material would not have caused sincere misunderstanding and rejected the defense. "A jury is the ultimate discipline to a silly argument." United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984), quoted in United States v. Regan, 937 F.2d 823, 827 (2d Cir. 1991).

To make this crucial factual determination, the jury must examine the material and be able to judge for themselves whether it was or was not likely to have confused Payne and have led to a good faith misunderstanding.

Exhibit L stands out from the other exhibits excluded by the trial court. It is two pages of tax law analysis written by Payne himself during the years at issue. Payne's belief would decide the issue of willfulness. His writing was objective, contemporaneous evidence to corroborate his testimony on the only contested issue. See, Harris at 1131. The writing summarized Dr. Payne's attempt at complicated legal research over a

several year period in a very complicated area of law.[11]

Exhibit L should not have been excluded under Rule 403 because there was scant danger the jury would be confused or misled by thinking it was a correct statement of the law. It was Payne's own contemporaneous writing about his own interpretation of the tax return filing requirements showing him to be honest with himself. Any defense which relies on the teachings of Cheek has the heavy burden of convincing the jury that an erroneous, even unreasonable, belief was

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[11] "One of the most esoteric areas of law is that of federal taxation. It is replete with 'full-grown intricacies', and it is rare that a 'simple, direct statement of the law can be made without caveat.'" U.S. v. Regan, supra at 827. (Discussing the defendant's interpretation of §1058 of the Internal Revenue Code).

nevertheless held in good faith. Common understanding of one's duty to file tax returns works against the defendant, and the prosecution will hammer that point to the jury. In determining such an issue fairly, the more unreasonable the claimed belief, the more necessary for the jury to examine the defendant's basis for his belief. "Knowledge and belief are characteristically questions for the factfinder, in this case the jury." Cheek, 498 U.S. 192, ___, 1991 U.S. Lexis 348 at page 10 (1991). If a witness testifies to something everyone is prone to believe, very little corroboration is needed. To the contrary, when presenting testimony at odds with normal expectation, more corroboration, more support is

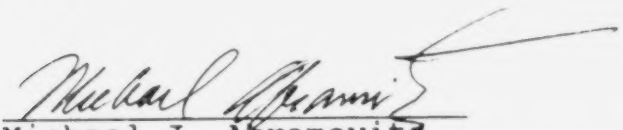
necessary. This is the essence of Cheek's evidentiary directive.

This conflict in the interpretations of Cheek will lead to inconsistent treatment of similar defendants charged under the same federal tax statute if they happen to be in different circuits. It has always been important that federal tax law be consistently applied, and hence this conflict among circuit courts of appeal should be resolved by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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February 22, 1993

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 91-8073
vs.	)	
JAMES C. PAYNE,	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. No. 91CR025-01B)

Michael Abramovitz (Theodore H. Merriam with him on the brief) of Abramovitz, Merriam and Shaw, Denver, Colorado for Defendant-Appellant.

John Barksdale, Assistant United States Attorney (Richard A. Stacy, United States Attorney, and Maynard D. Grant, Special Assistant United States Attorney, with him on the brief) Cheyenne, Wyoming for Plaintiff-Appellee.

Before MCKAY, Chief Judge, BALDOCK and LAY,* Circuit Judges.

BALDOCK, Circuit Judge.

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* The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Defendant James C. Payne appeals his convictions on four counts of tax evasion, 26 U.S.C. § 7201, and three counts of false representations of social security numbers. 42 U.S.C. § 408(a)(7)(B). Defendant contends that the evidence was insufficient on all counts because the affirmative acts giving rise to the criminal charges occurred outside of the applicable statutes of limitations. Defendant also claims that the district court erroneously excluded evidence regarding his good faith belief that his conduct was legal.[1] Our jurisdiction arises under 28 U.S.C. § 1291.

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[1] Notwithstanding that Defendant has included copies of the exhibits he claims were erroneously excluded in his appendix filed in this court, Defendant has also brought a motion in this court to accept the original exhibits. See 10th Cir. R. 10.2.2.

During the relevant period, Defendant received interest and dividend income from savings and brokerage accounts. When Defendant opened these accounts between 1977 and 1984, he provided false social security numbers to his bank and brokerage firms (collectively "the payors"). The payors issued Internal Revenue Service ("IRS") Forms 1099 annually for the 1984-87 tax years, reporting Defendant's income to the IRS under the false social security numbers. Defendant received the 1099 forms for the 1984-87 tax years from the payors, but never filed income tax returns for these years. In March 1991, Defendant was indicted on four counts of tax evasion for the years 1984-87 respectively and three counts of false representation of social security numbers. Following a jury

trial, Defendant was convicted of all counts.

The federal tax evasion statute provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ." 26 U.S.C. § 7201. The elements of a § 7201 violation are an affirmative act constituting an evasion or attempted evasion of the tax, willfullness, and the existence of a substantial tax deficiency. Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Swallow, 511 F.2d 514, 519 (10th Cir.), cert. denied, 423 U.S. 845 (1975). The failure to file a tax return is insufficient to establish the affirmative act necessary for a § 7201 conviction. Spies v. United States, 317

U.S. 492, 499 (1943). A tax evasion prosecution must be commenced within six years after the commission of the offense. 26 U.S.C. § 6531(2).

Defendant argues that the evidence is insufficient on the four tax evasion counts because the government failed to prove an affirmative act within the six year statute of limitations. Defendant concedes that he provided false social security numbers to the payors between 1977 and 1984, but argues that these affirmative acts cannot support his conviction because they occurred more than six years prior to the indictment. The government counters by arguing that Defendant's "annual reaffirmation"--i.e. failure to correct--the erroneous social security numbers on the 1099 forms that he received from the payors constitutes an

affirmative act within the limitations period. See United States v. Williams, 928 F.2d 145, 149 (5th Cir.) (knowingly maintaining false W-4 form on file with employer constituted affirmative act supporting § 7201 conviction), cert. denied, 112 S. Ct. 58 (1991).

We need not decide whether Defendant's failure to correct the erroneous social security numbers satisfies the "affirmative act" element of § 7201 because Defendant's argument is premised on the erroneous assumption that an affirmative act commences the running of the statute of limitations. Generally, the statute of limitations does not begin to run until the crime is complete. Toussie v. United States, 397 U.S. 112, 115 (1970); Pendergast v. United States, 317 U.S. 412, 418 (1943). "A crime is

complete as soon as every element of the crime occurs." United States v. Musacchio, 968 F.2d 782, 790 (9th Cir. 1991). Because a tax deficiency is an essential element of the crime of tax evasion, Sansone, 380 U.S. at 343; Swallow, 511 F.2d at 514, the statute of limitations did not begin to run on Defendant's § 7201 violations until Defendant incurred a tax deficiency. See United States v. Kafes, 214 F.2d 887, 890 (3d Cir.) (tax evasion offense not complete until defendant's tax payment became due), cert. denied, 348 U.S. 887 (1954). Defendant did not incur a tax deficiency until his tax liability for the years 1984-87 became due--i.e. April 15 of each succeeding year. See United States v. DiPetto, 936 F.2d 96, 97 (2d Cir.) (per curiam) (tax deficiency element satisfied

after April 15 of each year defendant failed to file tax return), cert. denied, 112 S. Ct. 193 (1991). Therefore, Defendant's earliest act of tax evasion was not complete until April 15, 1985. See id. at 98 ("limitations period began on the day on which the tax returns were due"). See also 85 A.L.R.Fed. Limitations Period-Tax Evasion § 3[a] at 885 (1987) (when tax evasion based on failure to file return, statute of limitations begins to run when return is due). The indictment, returned in March 1991, timely commenced the prosecution of Defendant for tax evasion within the six-year statute of limitations.[2]

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[2] Several circuits have held that a prosecution under § 7201 is timely if commenced within six years of the last affirmative act of evasion. DiPetto, 936 F.2d at 98; Williams, 928 F.2d at 149; United States v. Ferris, 807 F.2d 269, 271

(1st Cir. 1986), cert. denied, 480 U.S. 950 (1987); United States v. Trownsell, 367 F.2d 815, 816 (7th Cir. 1966) (per curiam). Courts have relied on this reasoning to extend the statute of limitations beyond six years after the defendant incurred a tax deficiency when the defendant has taken a subsequent affirmative act to conceal his crime. See Ferris, 807 F.2d at 272 (§ 7201 prosecution for evading 1976-77 taxes timely commenced in 1985 when defendant made affirmative statements in 1979 and 1983 to IRS agents to conceal income); Trownsell, 367 F.2d at 816 (§ 7201 prosecution for evading 1946-53 taxes timely commenced in 1964 when defendant transferred assets to Swiss bank account in 1961 to conceal charged evasion). Moreover, the Supreme Court has held that when the defendant, charged under § 7201, files a false tax return subsequent to the due date, the statute of limitations begins running when the return is filed rather than when the return is due. United States v. Habig, 390 U.S. 222, 224-25 (1968). We have similarly held that when the defendant files a false amended return after the due date, the statute of limitations in a tax evasion prosecution does not begin to run until filing of the amended return rather than the original due date. United States v. Samara, 643 F.2d 701, 704 (10th Cir.), cert. denied, 454 U.S. 829 (1981). We do not read these cases to stand for the proposition that the statute of limitations always

Defendant raises a similar statute of limitations argument relating to his convictions for false representations of social security numbers. 42 U.S.C. §408(a)(7)(B). The statue under which Defendant was convicted provides, in relevant part,

> [w]hoever, . . . for any . . . purpose, . . . with intent to deceive, falsely represents a number to be the social security account number assigned by the Secretary to him or to another person, when in fact such number is not the social security

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commences at the point the defendant takes his final affirmative act to evade taxes. Rather, these cases are consistent with our holding that the statute of limitations in a § 7201 prosecution does not begin to run until the defendant has taken an affirmative act and incurred a tax deficiency. Cf. United States v. Myerson, 368 F.2d 393, 395 n. 1 (2d Cir. 1966) (per curiam) (when defendant filed tax return early, statute of limitations on tax evasion prosecution began running on date return was due rather than date when defendant filed return), cert. denied, 386 U.S. 991 (1967).

> account number assigned by the Secretary to him or to such other person, . . . shall be guilty of a felony . . . .

Id. As § 408(a)(7)(B) does not contain its own statute of limitations, the general five year statute of limitations for non-capital offenses applies. 18 U.S.C. § 3282. Despite the undisputed evidence that Defendant's last false representation of a social security number to a payor occurred in 1984, more than five years prior to the return of the indictment, the government contends that a violation of § 408(a)(7)(B) is a continuing offense that is not completed until a Defendant corrects the false numbers, and that Defendant committed new acts of false representation when he reaffirmed the social security numbers by

failing to correct the 1099 forms he received from the payors.

The continuing offense doctrine "should be applied in only limited circumstances . . . [in which] the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie, 397 U.S. at 115. See also 18 U.S.C. § 3282 (statute of limitations should not be extended "[e]xcept as otherwise provided by law"). In Toussie, the defendant was prosecuted for failing to register for the draft and moved to dismissed on statute of limitations grounds because the prosecution was initiated more than five years after he was initially required to

register. The lower courts had interpreted the statue, which required all male citizens between the ages of eighteen to twenty-six to register, as imposing a continuing duty to register until the age of twenty-six. The Supreme Court reversed, finding nothing in the language of the statute or in the nature of the crime to compel the conclusion that failing to register was a continuing offense. Toussie, 397 U.S. at 120-22.

Like the statute at issue in Toussie, nothing in the plain language of § 408(a)(7)(B) nor the nature of the crime itself supports the government's contention that Congress intended it to be a continuing offense. Section 408(a)(7)(B) prohibits "falsely represent[ing] a social security number." Had Congress intended the crime to

continue beyond the point that Defendant made the false representations, Congress could easily have prohibited concealing or failing to disclose a true social security number as it did in another subsection. See 42 U.S.C. § 408(a)(4) (prohibiting "conceal[ing] or fail[ing] to disclose" the occurrence of an event affecting the continued right to payment). See also United States v. Morrison, 43 F.R.D. 516, 519 (N.D. Ill. 1967) (failure to notify Social Security Administration of beneficiary's death was a continuing course of conduct under § 408(a)(4) until notification of death was provided). However, by only prohibiting a false representation, Congress expressed its intention that the crime is complete at the time of the representation. See United States v. Joseph, 765 F.Supp. 326,

330 (E.D. La. 1991) (violation of § 408(a)(7)(B) is complete when the false representation is made).

Similarly, we find no merit in the government's contention that Defendant's failure to correct the erroneous social security numbers constituted a reaffirmation of the false representation. After Defendant falsely represented the social security numbers to the payors, he made no further representations of the erroneous social security numbers nor did he file any income tax returns. While the payors relied on the Defendant's false representation and conveyed the erroneous social security numbers to the IRS within the limitations period, Defendant is criminally liable only for his own false representations under the plain language of the statute. Cf. United States v.

Davis, 533 F.2d 921, 928 (5th Cir. 1976) (government agency's reliance, within five years of indictment, on defendant's earlier false representations did not extend statute of limitations for conspiring to violate 18 U.S.C. § 1001 by knowingly and willfully making false statements). To accept the government's construction of the statute would require us to read into the statute an affirmative duty by Defendant to correct the erroneous social security numbers on the 1099 forms he received from the payors. Absent some support in the language of the statute for the government's construction, we decline to adopt it. Because the evidence was undisputed that Defendant's last false representation of a social security number occurred in 1984, and the indictment was not returned until 1991, the prosecution

for false representations of social security numbers was barred by the five-year statute of limitations.

Finally, Defendant contends that the district court erroneously excluded documentary evidence relating to his asserted good-faith belief that he had no legal duty to file income tax returns. See Cheek v. United States, 111 S. Ct. 604, 610-11 (1991) (good-faith misunderstanding of the law or good-faith belief that one is not violating the law negates willfullness element in § 7201 prosecution). We review for an abuse of discretion and will reverse "only if the exclusion of the evidence is so significant that it results in 'actual prejudice' because it has a 'substantial and injurious effect or influence in determining the jury's verdict.'" United

States v. Fingado, 934 F.2d 1163, 1164 (10th Cir.) (quoting United States v. Vreeken, 803 F.2d 1085, 1090 (10th Cir. 1986), cert. denied, 479 U.S. 1067 (1987)), cert. denied, 112 S. Ct. 320 (1991).

The district court permitted Defendant to testify extensively about his misunderstanding of the tax laws. Defendant, a retired psychiatrist who up until at least 1978 had annually filed a tax return, testified that he did not file tax returns for 1984-1987 due to his honestly held belief that the Internal Revenue Code ("IRC") did not require persons to annually file an income tax return. After receiving information from a tax protester organization, Defendant researched the tax law. Defendant read the United States Supreme Court's opinion

in Flora v. United States, 362 U.S. 145 (1960), and copied it, underlining a sentence which reads: "Our system of taxation is based upon voluntary assessment and payment, not upon distraint." Id. at 176 (footnote omitted). Defendant then looked up the definition of "distraint" finding it to be defined as "coercion or force." Defendant testified that this research confirmed his belief that the act of filing a tax return was voluntary, but that if he did not file a return, the government would bill him. Defendant testified that he would have paid the tax if the government had sent him a bill.

Defendant also testified that he later purchased a book entitled How Anyone Can Stop Paying Income Taxes by Irwin Schiff which confirmed his belief that the

filing of a tax return is voluntary and that the IRS must assess taxes and send the taxpayer a bill. The Schiff book cited to sections in the IRC which Defendant subsequently purchased. Defendant confirmed that the Schiff book's citations were correct thereby furthering his belief that the filing of a return was voluntary and that the IRS would eventually bill him. During his legal research, Defendant took a series of handwritten notes.

Defendant sought to introduce into evidence his underlined copy of the Flora opinion, his marked up copy of the Schiff book and the 1984 and 1987 IRC's, as well as his handwritten legal research notes. The district court rejected the admission of these exhibits recognizing "a danger of prejudice . . . that outweigh[ed] any

evidentiary purpose that could be served with regard to the issue of willfullness . . . ." However, the district court permitted Defendant to physically possess the exhibits on the witness stand, to display them to the jury, and to read all pertinent portions to the jury and explain their impact on his alleged misunderstanding of the tax laws. Defendant quoted pertinent passages from the Flora opinion, and the judge even read the underlined passage to the jury. Defendant also quoted several passages from the Schiff book and various portions of the IRC. Finally, Defendant was permitted to explain each passage of his handwritten notes to the jury.

Because the willfullness element of § 7201 requires the specific intent to evade taxes, a defendant in a tax evasion

prosecution "is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969) (reversing tax evasion conviction due to district court's exclusion of transcripts of testimony of the defendant's superior, who was not available to testify, which corroborated defendant's claimed belief that merchandise and services he received were nontaxable). See also Vreeken, 803 F.2d at 1089-90 (district court's limitation of defendant's testimony concerning his reasoning in structuring tax shelters was error in § 7201 prosecution). "[F]orbidding the jury to consider evidence that might negate willfullness . . . raise[s] a serious question under the Sixth Amendment's jury trial provision."

Cheek, 111 S. Ct. at 611. Nonetheless, "Cheek [does] not require the admission of any and all evidence showing a basis for the defendant's belief." Fingado, 934 F.2d at 1165 n.1.

Defendant was permitted to testify concerning the basis of his claimed good-faith misunderstanding of the tax laws. The trial court permitted Defendant wide latitude in reading pertinent excerpts from the Flora opinion, Schiff book, IRC's, and his notes to the jury. Defendant was simply not permitted to introduce these documents as exhibits. In United States v. Hairston, 819 F.2d 971 (10th Cir. 1987), we found no abuse of discretion on similar facts noting that "[t]he court did not prevent [the defendant] from mounting a defense . . . but rather exercised its discretion

regarding the form in which such evidence should be admitted so as to minimize jury confusion." Id. at 973. See also United States v. Mann, 884 F.2d 532, 538 (10th Cir. 1989). Defendant's direct testimony was far more probative on the issue of his good faith misunderstanding of the tax laws than the actual materials. See Mann, 884 F.2d at 538; Hairston, 819 F. 2d at 973. See also Fingado, 934 F.2d at 1164-65 (any error in excluding exhibits was harmless when defendant testified about claimed good-faith misunderstanding of the tax laws); United States v. Harrold, 796 F.2d 1275, 1284-85 (10th Cir. 1986) (same), cert. denied, 479 U.S. 1037 (1987). Moreover, permitting legal materials into the jury room creates the potential for undue jury confusion concerning the governing law. See United

States v. Willie, 941 F.2d 1384, 1395-98 (10th Cir. 1991) (alternatively holding that exhibits, which included statutes, a treaty, a historical treatise, and letters from defendant, were properly excluded under Fed. R. Evid. 403), cert. denied, 112 S. Ct. 1200 (1992). Given that Defendant was permitted to testify extensively concerning the basis for his claimed good-faith misunderstanding of the tax laws and was permitted read the pertinent excerpts of the materials on which he allegedly relied, we find no abuse of discretion by district court in refusing to accept the proffered exhibits into evidence.

Defendant's motion to transmit the original exhibits to this court as part of the record on appeal is DENIED. Defendant's convictions for tax evasion

are AFFIRMED. Defendant's convictions for falsely representing social security numbers are REVERSED. The case is REMANDED to the district court with instructions to VACATE Defendant's convictions for falsely representing social security numbers and for any further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	)	
v.	)	No. 91-8073
JAMES C. PAYNE, Defendant - Appellant.	)	

ORDER
Filed November 24, 1992

Before MCKAY, Chief Judge, BALDOCK and LAY*, Circuit Judges.

The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk
/s/ Patrick Fisher
By: Patrick Fisher
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

	) No. 91 CR025B
	) Ct.1-4: 26
UNITED STATES OF AMERICA,	) U.S.C.§7201
	) (Tax evasion)
Plaintiff,	)
	) Ct.5-7:
v.	) 42 U.S.C.§
	) 408(a)(7)(B)
	) formally 42
JAMES C. PAYNE,	) U.S.C.§408
	) (g)(2) (False
Defendant.	) Representa-
	) tion of
	) Social Se-
	) curity
	) Number.)

I N D I C T M E N T

THE GRAND JURY CHARGES THAT:

COUNT ONE

During the calendar year 1984, JAMES C. PAYNE, a resident of Wyoming, had and received taxable income in the sum of

approximately $75,363; that upon said taxable income there was owing to the United States of America a substantial income tax; that well-knowing and believing the foregoing facts, JAMES C. PAYNE, on or about April 15, 1985, in the District of Wyoming, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or about April 15, 1985, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct income, and by using false Social Security numbers;

All in violation of 26 U.S.C. §7201.

COUNT TWO

During the calendar year 1985, JAMES C. PAYNE, a resident of Wyoming, had and received taxable income in the sum of approximately $61,706; that upon said taxable income there was owing to the United States of America a substantial income tax; that well-knowing and believing the foregoing facts, JAMES C. PAYNE, on or about April 15, 1986, in the District of Wyoming, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or before April 15, 1986, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the

Internal Revenue said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct income, and by using false Social Security numbers;

All in violation of 26 U.S.C. § 7201.

COUNT THREE

During the calendar year 1986, JAMES C. PAYNE, a resident of Wyoming, had and received taxable income in the sum of approximately $73,564; that upon said taxable income there was owing to the United States of America a substantial income tax; that well-knowing and believing the foregoing facts, JAMES C. PAYNE, on or about April 15, 1987, in the District of Wyoming, did willfully attempt to evade and defeat the said income tax

due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or about April 15, 1987, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct income, and by using false Social Security numbers;

All in violation of 26 U.S.C. § 7201.

COUNT FOUR

During the calendar year 1987, JAMES C. PAYNE, a resident of Wyoming, had and received taxable income in the sum of approximately $52,948; that upon said taxable income there was owing to the

United States of America a substantial income tax; that well-knowing and believing the foregoing facts, JAMES C. PAYNE, on or about April 15, 1988, in the District of Wyoming, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or before April 15, 1988, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct income, and by using false Social Security numbers;

All in violation of 26 U.S.C. § 7201.

COUNT FIVE

From on or about April 1, 1986 up to the date of the return of this Indictment the Defendant, JAMES C. PAYNE, for the purpose of obtaining a thing of value; to wit: taxable income, from any person with intent to deceive, falsely represented a number, 390-10-0270, to be the Social Security account number assigned by the Secretary of Health and Human Services to JAMES C. PAYNE, when in fact such number was not the Social Security account number assigned by the Secretary of Health and Human Services to JAMES C. PAYNE;

All in violation of 42 U.S.C. § 408 (a)(7)(B) formally U.S.C. § 408(g)(2).

COUNT SIX

From on or about April 1, 1986 up to the date of the return of this Indictment

the Defendant, JAMES C. PAYNE, for the purpose of obtaining a thing of value; to wit: taxable income, from any person with intent to deceive, falsely represented a number 387-64-5657 to be the Social Security account number assigned by the Secretary of Health and Human Services to another person when in fact such number was not the Social Security account number assigned by the Secretary of Health and Human Services to that person;

All in violation of 42 U.S.C. § 408 (a)(7)(B) formally 42 U.S.C. § 408(g)(2).

COUNT SEVEN

From on or about April 1, 1986 up to the date of the return of this Indictment the Defendant, JAMES C. PAYNE, for the purpose of obtaining a thing of value; to wit: taxable income, from any person with intent to deceive, falsely represented a

number 387-68-4487 to be the Social Security account number assigned by the Secretary of Health and Human Services to another person when in fact such number was not the Social Security account number assigned by the Secretary of Health and Human Services to that person;

All in violation of 42 U.S.C. § 408 (a)(7)(B) formally 42 U.S.C. § 408(g)(2).

A TRUE BILL:

/s/ Signature unreadable
FOREPERSON

/s/ Richard A. Stacy
RICHARD A. STACY
United States Attorney

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 10 1993
OFFICE OF THE CLERK

No. 92-1518

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES C. PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute of limitations in a tax evasion case begins to run before a tax deficiency arises.

2. Whether the district court erred in excluding documentary evidence, where petitioner was allowed to read and explain pertinent portions of the materials to the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1518

JAMES C. PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 978 F.2d 1177.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1992. The court of appeals denied a petition for rehearing on November 24, 1992. Pet. App. A27. The petition for a writ of certiorari was filed on February 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Wyoming, petitioner was

convicted on four counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201, and three counts of making false representations with respect to social security numbers, in violation of 42 U.S.C. 408(g)(2) (1988).[1] The court of appeals affirmed the convictions for tax evasion, but reversed the false representation convictions. Pet. App. A1-A26.

1. This case involves interest and dividend income petitioner received during the 1984 through 1987 tax years from savings and brokerage accounts that he opened between 1977 and 1984. When he opened the accounts he provided false social security numbers. For each of the tax years in question, the payors issued a Form 1099 reporting the interest and dividend income to the IRS under the false social security numbers provided by petitioner; petitioner did not file income tax returns for those years. In March 1991, a federal grand jury in Wyoming indicted petitioner on four counts of willfully attempting to evade income tax (one count for each year starting with 1984 and running through 1987), and three counts of false representations of social security numbers (one count for each of three false numbers). Pet. App. A3.

2. At trial, petitioner argued that he was innocent of the tax evasion counts because he did not believe the Internal Revenue Code required him to file income tax returns. Petitioner testified that his belief rested in part on this Court's opinion in *Flora* v. *United States*, 362 U.S. 145 (1960), a book entitled *How Anyone Can Stop Paying Income Taxes* by

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[1] That provision has been redesignated and now appears at 42 U.S.C. 408(a)(7)(B) (Supp. III 1991).

Irwin Schiff, and handwritten notes evidencing his research into the question. The district court allowed petitioner to use those materials when he was on the witness stand, to show them to the jury, and to read pertinent portions to the jury and testify regarding the effect he claimed they had on his views as to the lawfulness of his conduct. The district court also read the relevant portion of the *Flora* opinion to the jury. The district court refused, however, to admit those materials into evidence, based on its view that the danger of confusion that would arise from the admission of the materials outweighed any additional evidentiary value they would have. Pet. App. A18-A21.

3. The court of appeals affirmed petitioner's convictions for tax evasion. Pet. App. A1-A26.[2] First, the court rejected petitioner's arguments that the tax evasion convictions were barred by the statute of limitations because the affirmative acts on which the government relied had occurred before the limitations period. *Id.* at A4-A9. The court reasoned that the statute of limitations does not begin to run until the crime is complete and that because a tax deficiency is an element of attempted evasion of tax, petitioner's offenses were not complete until he incurred tax deficiencies. *Id.* at A6-A7. Because a tax deficiency does not accrue until the date the return is due—April 15 of the succeeding calendar year in this case —petitioner's earliest charged deficiency (for 1984) accrued on April 15, 1985. *Id.* at A7-A8. Hence, the March 1991 indictment commenced the prosecution

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[2] The court reversed petitioner's convictions for making false representations of social security numbers as barred by the statute of limitations. Pet. App. A10-A17.

within the six-year statute of limitations found in 26 U.S.C. 6531(2). Pet. App. A8-A9.

The court also rejected petitioner's contention that the district court erred in excluding the documentary evidence relating to petitioner's testimony that he believed his conduct was lawful. Pet. App. A17-A25. The court explained that the district court did not abuse its discretion in excluding the documents because its actions as a whole gave the defendant a fair opportunity to "moun[t] a defense," and reflected an appropriate limitation on "the form in which * * * evidence should be admitted so as to minimize jury confusion." *Id.* at A23-A24.

ARGUMENT

1. Petitioner first reiterates his contention (Pet. 22-33) that the statute of limitations barred his convictions for tax evasion. It is well settled that statutes of limitations generally do not begin to run until the crime is complete, *Toussie* v. *United States*, 397 U.S. 112, 115 (1970) (citing *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943)), and that a crime is not complete until each element of the crime has occurred, *United States* v. *Musacchio*, 968 F.2d 782, 790 (9th Cir. 1992); *United States* v. *DiPetto*, 936 F.2d 96, 98 (2d Cir.), cert. denied, 112 S. Ct. 193 (1991). The elements of a violation of 26 U.S.C. 7201 are: (1) an affirmative act constituting an evasion or attempted evasion of the tax; (2) willfulness; and (3) the existence of a tax deficiency. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Therefore, the statute of limitations does not begin to run in a tax evasion case until a tax deficiency arises. Hence, there can be no tax deficiency for a particular tax year (and therefore

no violation of Section 7201), until the date on which the return and tax for that year are due. Because the indictment in this case was filed less than six years after the earliest date on which a return was due, the statute of limitations did not bar the tax evasion counts. See *DiPetto*, 936 F.2d at 98; *United States* v. *Williams*, 928 F.2d 145, 149 (5th Cir.), cert. denied, 112 S. Ct. 58 (1991).[3]

Petitioner suggests that the decision of the court of appeals conflicts with the decisions of other courts holding that an affirmative act of evasion must occur within the six-year statute of limitations period. Pet. 22, 25 (citing Pet. App. A8-A9 n.2). The problem with that suggestion is that although many courts have held that the limitations period does not begin to run before the last affirmative act of evasion, *e.g.*, *United States* v. *Ferris*, 807 F.2d 269, 271 (1st Cir. 1986), cert. denied, 480 U.S. 950 (1987), none of the cases to which petitioner refers holds—or even suggests—that the statute of limitations would begin to run on that date even if one of the elements of the crime had not yet been satisfied. Each of those cases is consistent with the rule that the statute does not begin to run until all the elements of the offense have occurred. See, *e.g.*, *United States* v. *Habig*, 390 U.S. 222, 224-226 (1968) (prosecution for tax evasion timely if commenced within six years of date return is due, even if return is filed early).

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[3] Petitioner's reliance (Pet. 31-32) on *Williams* is misplaced. The court in that case held "that the limitations period for a prosecution under section 7201 in which no tax return was filed begins to accrue the day the return is due." 928 F.2d at 149.

2. Petitioner also argues (Pet. 33-50) that the district court erred in excluding the exhibits relating to petitioner's testimony that he believed his conduct was lawful. The admission or exclusion of evidence is a matter within the discretion of the district court, see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974), and it is quite acceptable for a district court to exercise its discretion under Rule 403 of the Federal Rules of Evidence to bar the admission into evidence of legal materials. As the courts of appeals have recognized, documents of that nature pose a great risk of confusing the jury about what the law actually requires, while adding little to a defendant's testimony about his asserted beliefs. See *United States* v. *Flitcraft*, 803 F.2d 184, 185-186 (5th Cir. 1986) (upholding exclusion of opinions and documents upon which defendant claimed to have relied, because materials were cumulative and presented danger of confusing jury); *United States* v. *Kraeger*, 711 F.2d 6, 7-8 (2d Cir. 1983); *United States* v. *Bernhardt*, 642 F.2d 251, 253 (8th Cir. 1981).

To be sure, a defendant in a tax evasion case who can establish a good-faith belief—however mistaken—that he has complied with the tax laws can negate the willfulness requirement of the statute and thus make out a valid defense to the charge. See *Cheek* v. *United States*, 498 U.S. 192 (1991). Accordingly, the defendant is entitled to present testimony and evidence related to such a claim. Cf. *id.* at 203 ("[F]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision."). But a finding of relevance does not override

the trial court's discretion to exclude cumulative and confusing evidence of marginal probative value. See *Hamling*, 418 U.S. at 127 (district court "retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body"); *United States* v. *Fingado*, 934 F.2d 1163, 1165 n.1 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991).

The district court in this case did not forbid "the jury to consider evidence that might negate willfulness," *Cheek*, 498 U.S. at 203. It merely precluded the introduction of cumulative material likely to confuse the jury. As the court of appeals explained, petitioner's "direct testimony was far more probative on the issue of his good faith misunderstanding of the tax laws than the actual materials." Pet. App. A24. Similarly, it was entirely appropriate for the district court to rely on "the potential for undue jury confusion concerning the governing law" that would arise if the materials were admitted. *Ibid.*

Petitioner contends that the decision of the court of appeals in this case conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits. Pet. 34-43 (citing *United States* v. *Powell*, 955 F.2d 1206 (9th Cir. 1992); *United States* v. *Harris*, 942 F.2d 1125 (7th Cir. 1991); and *United States* v. *Lankford*, 955 F.2d 1545 (11th Cir. 1992)). In his view, those courts "have interpreted the *Cheek* evidentiary directive to allow a defendant to introduce any relevant evidence upon which he claims to have actually relied for the

purpose of disproving the willfulness element of specific intent tax crimes." Pet. 34-35.

None of the cases on which petitioner relies adopts the broad rule he articulates. Rather, each of those cases rejected a trial court ruling that had the effect of preventing the defendant from conveying to the jury the basis for his alleged understanding of the tax laws. In *Powell*, the district court refused to allow the defendants to read to the jury the legal materials upon which they claimed to have relied. See 955 F.2d at 1209.[4] In *Lankford*, the district court refused to allow a defense expert witness to testify concerning the reasonableness of the defendant's beliefs. See 955 F.2d at 1550-1551. And in *Harris*, the district court excluded as hearsay letters written to the defendant by an elderly man who had made payments to her; the letters were offered to show only that they had led the defendant to believe that the payments were intended as gifts, and the court concluded that the defendant "had no other objective means of proving that belief." See 942 F.2d at 1130-1131.

In the instant case, by contrast, petitioner was given a full opportunity to present his good-faith defense. He was afforded "wide latitude in reading pertinent excerpts from the *Flora* opinion, Schiff book, [Internal Revenue Codes], and his notes [on his research] to the jury." Pet. App. A23. Furthermore, petitioner was able to testify extensively about the basis for his claimed understanding of the tax laws. See *id.* at A23-A25. Thus, the decision of the court of

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[4] In any event, the discussion in *Powell* was dictum, because the court overturned the convictions in that case on other grounds. See 955 F.2d at 1213-1214.

appeals does not conflict with the decisions on which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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